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Alpine Log Homes, Inc. and Montana District of Laborers, Laborer International Union of North America, AFLCIO and Steven E. Lehman. Cases 19-CA-26004, 19-CA-26279, and 19-CA-26372

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On January 28, 2000, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

The judge found that Respondent violated the Act by, among other things, constructively discharging employee Lehman.³ We agree. The Board has held that a significant reduction in income for an indefinite period of time, causing an employee to quit and seek alternative employment, when a motive for such treatment was protected activity, will establish constructive discharge. See *Consec Security*, 325 NLRB 453 (1998), and cases cited therein, *enfd. mem.* 185 F.3d 862 (3d Cir. 1999). In the instant case, between February 4 and March 3, 1999, the Respondent issued Lehman two disciplinary notices and

suspended him twice because of his union activity. Lehman received a written correction notice on February 4, 1999, for distributing literature critical of the Respondent's evaluation process. On February 17, Lehman was issued a written correction notice and suspended for 5 days without pay for discussing union matters with members of his crew and other employees.⁴ This notice stated that any further solicitation would "result in termination." On March 3, within days of returning to work from the February 17 suspension and the loss of a week's pay, Lehman was suspended for an indefinite period of time for, *inter alia*, "continued harassment of co-workers."⁵ The Respondent, however, presented no evidence that Lehman engaged in any behavior that would constitute harassment of his coworkers sufficient to deny him the protection of the Act. It was reasonable for Lehman to conclude that, if he returned to the Respondent's employ, he would continue to suffer repeated loss of earnings as a result of the Respondent's conduct. In these circumstances, we find that Lehman's decision not to return constituted a constructive discharge.⁶

ORDER⁷

The National Labor Relations Board orders that the Respondent, Alpine Log Homes, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and enforcing verbal and written no-solicitation and distribution rules that prohibit employees from engaging in union solicitation and distribution of union-related materials on the Respondent's property during nonworking time, including breaktime, lunchtime, and before and after work.

(b) Issuing correction notices or other warning notices or suspending employees for refusing to sign a receipt

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We have modified the language of the Order and notice to conform to the violations found by the judge and to the requirements of the Board's decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996); *Excel Container, Inc.*, 325 NLRB 17 (1997); and *Ferguson Electric*, 335 NLRB No. 15 (Aug. 24, 2000).

³ The complaint alleges that on about March 2, 1999, the Respondent "suspended and conditionally discharged its employee Lehman." The judge found that the indefinite suspension occurred on March 2 or 3 and that it was in fact a discharge, as alleged in the complaint. In the exceptions and briefs, the Respondent as well as the General Counsel characterizes the indefinite suspension as a constructive discharge. We find therefore that the indefinite suspension was alleged and litigated as a constructive discharge.

⁴ The judge found that, during the course of their work, employees customarily talk about anything that may be of interest to them.

The notice stated that Lehman was "being suspended indefinitely, without pay, pending a further meeting . . . one week from today."

⁵ In finding that Respondent constructively discharged Lehman, Member Liebman relies on both the traditional and "Hobson's choice" theories of constructive discharge. *Intercon I (Zercom)*, 333 NLRB No. 30, slip op. at 1 fns. 3 and 4 (2001).

⁶ Under the latter theory, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Sec. 7 rights and the employee quits rather than comply with the condition. Here, Member Liebman finds that, by issuing Lehman two disciplinary notices and twice suspending him for his union activity, Respondent led Lehman to reasonably believe that he was compelled to choose between abandoning his union activity or being terminated.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

for the Employee Handbook requiring employees to acknowledge that they will abide by an unlawful no-solicitation and distribution rule.

(c) Issuing correction notices or other warning notices to employees or suspending employees for engaging in union-related solicitation and union-related distribution of materials on company property during nonworking times.

(d) Issuing correction notices or other warning notices or otherwise warning employees to refrain from distributing leaflets, letters or other materials that criticize our employee evaluation procedure or any other procedure, rule, regulation or policy.

(e) Issuing correction notices or other warning notices to employees or otherwise warning, suspending or constructively discharging employees for discussing union-related matters with other employees at any time, including working time.

(f) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act.

(a) Within 14 days from the date of this Order, expunge the current "Solicitations and Distributions" section from its Employee Handbook.

(b) Within 14 days of the date of this Order, offer Steven Lehman full reinstatement to his former position, or if such a position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Make whole employees Lennie Thompson and Steven Lehman for any loss of wages or benefits they may have suffered by reason of their unlawful suspensions in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service from the Region, post at the Respondent's place of business the attached notice

marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 19, after being duly signed by the Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed down the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 4, 1998.

(e) Within 14 days from the date of this Order, remove from the personnel files of Lennie Thompson and Steven Lehman any corrective notices, warning notices, letters or any other documents that relate to their suspensions or terminations, and advise the employees in writing that this has been done and that neither any documents nor their suspensions will be used against them in any way.

(f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring.

I do not agree with my colleagues that Lehman was *constructively* discharged in violation of Section 8(a)(3).¹ Rather, I conclude that he was *actually* discharged in violation of Section 8(a)(3). Accordingly, while I do not

⁸ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ See my dissenting opinions in *Georgia Farm Bureau Mutual Insurance Cos.*, 333 NLRB No. 100 (2001), *LSF Transportation*, 330 NLRB No. 145 (2000), and *Consec Security*, 325 NLRB 453 (1998).

subscribe to the “constructive discharge” analysis of my colleagues, I concur in the 8(a)(3) result.

The evidence shows that Respondent unlawfully suspended Lehman on February 17. The suspension notice said that Lehman would be discharged if he continued solicitation activities. After the suspension, Lehman returned on February 25 and resumed his solicitation activities. On March 2 or 3, Respondent suspended Lehman “indefinitely.” Lehman was supposed to call Respondent on March 9 to discuss the matter. Lehman did not call on March 9, but did call on March 10. He said that, if he still had a job, he was giving 2 weeks’ notice of resignation. Respondent called back 10 minutes later and said that Lehman did not have a job because he failed to call on March 9.

In my view, Respondent discharged Lehman on March 10. Respondent told him that he no longer had a job. Respondent thereby fulfilled its threat to terminate Lehman if he persisted in solicitation activity. Respondent’s reliance on Lehman’s 1-day tardiness in calling Respondent was a pretext that was seized upon by Respondent to mask its unlawful reason for terminating Lehman.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or enforce verbal or written no-solicitation and distribution rules that prohibit you from engaging in union solicitation and distribution of union-related materials on company property during

nonworking time, including breaktime, lunchtime or before or after work.

WE WILL NOT issue correction notices or other warning notices to you or suspend you for asserting your right not to sign a receipt for the Employee Handbook requiring you to acknowledge that you will abide by an unlawful no-solicitation and distribution rule.

WE WILL NOT issue correction notices or other warning notices to you or suspend you for engaging in union-related solicitation and union-related distribution of materials on company property during nonworking times.

WE WILL NOT issue correction notices or other warning notices or otherwise warn you to refrain from distributing leaflets, letters or other materials that criticize our employee evaluation procedure or any other procedure, rule, regulation, or policy.

WE WILL NOT issue correction notices or other warning notices to you or otherwise warn, suspend or constructively discharge you for discussing union-related matters with other employees at any time, including working time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

WE WILL delete and cease enforcing the “Solicitations and Distributions” section of our Employee Handbook, as this provision has been found to be in violation of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board’s Order offer employee Steven Lehman immediate reinstatement to his former position of employment and make him whole, with interest, for any loss of wages he may have suffered as a result of his unlawful termination.

WE WILL make employees Lennie Thompson and Steven Lehman whole, with interest, for any loss of wages or other benefits they may have suffered as a result of their unlawful suspensions.

WE WILL within 14 days from the date of the Board’s Order, remove from their personnel files any corrective notices, warning notices, letters, or any other documents pertaining to their suspensions.

ALPINE LOG HOMES, INC.

Miriam C. Delgado, Esq., for the General Counsel.
Robert E. Mann, Esq., of Chicago, Illinois, for the Respondent.
Karl L. Englund, Esq., of Missoula, Montana, for the Union.
Steven Lehman, Hamilton, of Montana, pro se.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Hamilton, Montana on September 28 and 29, 1999. The Charge in Case 19-CA-26004 was filed by Montana District of Laborers, Laborers International Union of North America, AFL-CIO (the Union) on June 22, 1998. The charge in Case 19-CA-26279 was filed by the Union on December 24, 1998. The charge in Case 19-CA-26372 was filed by Steven Lehman, an individual, on February 26, 1999, and an amended charge was filed by Lehman on July 13, 1999. On December 30, 1998, the Acting Regional Director for Region 19 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint, and notice of hearing alleging violations by Alpine Log Homes, Inc. (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). On September 13, 1999, the Regional Director for Region 19 of the Board issued a second order consolidating cases, consolidated amended complaint and notice of hearing alleging further violations by the Respondent of Section 8(a)(1) and (3) of the Act. The Respondent, in its answers to the complaints, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Montana corporation with an office and place of business located in Victor, Montana, where it is engaged in the manufacture and sale of log homes and related structures on a retail basis. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$500,000, and annually purchases and causes to be transferred and delivered to its facilities within the State of Montana, goods and services valued in excess of \$5,000 which originated outside the said State. It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union herein is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) and (3) of the Act by promulgating and enforcing an unlawful no-solicitation and no-

distribution rule, and by disciplining, laying off, and discharging employees for violating the said rule and for engaging in union activity.

B. *The Facts*

Employees Steven Lehman and Lennie Thompson began assisting the Union in organizing the Respondent's employees in September 1997. They distributed union-related information in the employees' parking lot by putting flyers on car windshields or inside the vehicles if the windows were open. After work Thompson found a threatening note on his windshield that said, "you will be taken out." He reported this to Dick Cinfio, Respondent's Operations Manager, and to the County Sheriff's Department. Cinfio told Thompson that the Respondent did not condone and would not permit violence on its property, but that Thompson should "watch his back" because there were some pretty tough guys "out there," apparently meaning coworkers. Cinfio said that he would report the matter to John Powell, Respondent's President. Later Cinfio told Thompson that the county attorney said that Thompson had been trespassing by putting flyers on the vehicles in the Respondent's parking lot, and Cinfio told him to discontinue this activity.

On September 30, 1997, Powell called a meeting of all the yard employees and read the following statement to them:

As most of you know, one or more individuals are attempting to establish union representation at Alpine. We respect their right to do so, although we do not believe their reasons to be valid.

However, do to recent events, we feel it important now to reestablish some groundrules governing such matters.

Prounion information has been distributed on Alpine property. It has been hand delivered, and it has been found on & in vehicles. Most recently a threatening letter was found on one of the prounion individuals windshields.

1) Alpine's tolerance for violence in the workplace is "0." We do not accept violence or the threat of violence in any form.

2) As has been our position in the past, no information may be disseminated on Alpine property to do with this issue or any other issue whether it be Union, religious, sports, or whatever.¹

We encourage healthy debate, void of violence, but not on company time.

Apparently Thompson and Lehman did not continue placing flyers on employees' vehicles in the parking lot. However, on about June 3, 1998, they did stand outside the fence to the parking lot and distribute literature to employees who were exiting the parking lot after work. On June 4, 1998, Thompson was called to Cinfio's office and told by Cinfio that the distribution

¹ There was no prior written rule to this effect, and this statement by Powell was apparently the first general pronouncement that the Respondent had ever made prohibiting the dissemination of information on the Respondent's property. Prior to this time, according to certain of the Respondent's managers, *infra*, this policy was simply, in effect, a matter of common knowledge that employees would learn over time, and it was not until the union activity began that the Respondent formally advised the employees of such a rule..

of literature of any kind was against the Respondent's policy. He was given an "Employee Correction Notice" which states that, "Distribution of literature on Company Property, eg. Letters, pamphlets . . . is in violation of Company Policy." The Notice directed Thompson to "Stop distribution of literature," and advised him that if he continued this activity he would be subject to "time off from work without pay, or termination." Thompson signed his name to the Notice and was in the process of objecting to it by writing, "I do not agree per federal law," when Cinfio observed this and physically knocked Thompson's arm away from the document.

In late August 1998, a meeting was held in the yard at the end of the work shift. All the yard employees were present. Cinfio distributed a handbook to each of the employees, and the employees were instructed to take it home, read it, sign and date the acknowledgment receipt in the front of the handbook, and return the acknowledgment receipt to Cinfio by September 1, 1998. They were told that any employee who did not sign it would not be permitted to work until it was signed.

The handbook contains the following section entitled "Solicitations and Distributions":

Solicitation for any cause during working time and in working areas is not permitted. Working time is defined as the time employees are being paid. Employees are not permitted to distribute noncompany literature at any time on company property. Employees are not permitted to sell chances, merchandise or otherwise solicit or distribute literature on company property.

Thompson signed the "Receipt and Acknowledgment of Alpine Employee Handbook" form on August 31, 1998. The form states, *inter alia*, the following:

I have received and read a copy of the Alpine Employee Handbook. I understand that the policies and benefits described in it are subject to change at the sole discretion of Alpine at any time. I agree to work for Alpine under these conditions. I also understand that the effective date of this handbook is September 1, 1998.

Because Thompson disagreed with the aforementioned "Solicitations and Distributions" section of the handbook, he wrote at the bottom of the receipt form that, "In signing this contract please note that the proper interpretation of the National Labor Relations Act leads me to believe that Federal law allows me to distribute *union* literature in nonwork areas on my own time." (Emphasis added.). He had this disclaimer notarized.

Thompson handed the foregoing receipt to Powell prior to work on September 1, 1998. Upon reading the form, Powell told Thompson to wait in the lunchroom before going to work. About 15 minutes later Thompson met with Powell, Cinfio and Alan Burruss, senior crew leader. Powell refused to accept the receipt with the disclaimer, and advised Thompson that if he wanted to go to work he would have to sign the receipt without any additional comments. Thompson said that by signing the receipt without objecting to its language, he believed he was giving up his right to organize, and could not do that without conferring with legal counsel. Powell again stated that he would not be permitted to go to work under this condition.

Thompson asked if he was being fired, and Powell said no, but that it was Thompson's choice whether he wanted to work or not. Thompson refused to sign the form and was not permitted to go to work. Further, according to Thompson, he does not believe he was told by Powell, as Powell contends, *infra*, that he could submit a separate document setting forth his objection to the provision of the handbook.

The next day, September 2, 1998, Senior Crew Leader Burruss came to Thompson's home and delivered a letter from Powell that recounts the event of the preceding day. The letter states, *inter alia*, as follows:

I pointed out that Alpine's personnel forms are not appropriate places to express your views by amending the form, then all employees will have to be allowed to do the same thing. This cannot be tolerated. I explained that you would not be allowed to work until and unless you first signed the Receipt and Acknowledgment document, without the amendment. You then left the office and have not reported to work since.

Alpine has always enforced a policy not to permit distribution of written materials on its property. This is not a new policy. The policy allows for no exceptions; it applies regardless of the motivation for the distribution or the particular message included in the material. The distinction between "work" and "non-work" areas is meaningless; because clients often are on site and because they use the parking lot, there is no area that can be described as a "non-work" area. This is our position. We understand that you disagree with our position. The question is now before the NLRB and it therefore will get resolved by legal means. By signing the form, you are not agreeing to give up any rights that you may have by virtue of a decision of the NLRB. There is no need to make a personal demonstration by quitting your job.

Therefore, I recommend that you promptly return to the office, sign the form without amending it, go back to work, and let the NLRB resolve your question about whether Alpine's policy is or is not legal. If you do not do so by Thursday, September 3, 1998 you will be considered as having quit your job voluntarily.

On September 3, 1998, after missing 2 days of work, Thompson signed the receipt without any modifications, and was permitted to return to work.

In November 1998, Thompson and Lehman continued distributing prounion leaflets on the public right-of way outside of the Respondent's gate as the employees were exiting the premises. They engaged in this activity on several different occasions. One of these leaflets is in the format of a letter to the employees, signed by Lehman, in which he states that some of the Respondent's employees are "struggling to provide food for their families," while the Respondent's owner and others have been "rewarded handsomely" and are "laughing all the way to the bank." Lehman, in this letter, advocates the signing of authorization cards on behalf of the Union, stating, "If you haven't signed your authorization cards for the Laborer's Union, then I urge you to do so at this time. If you need authorization cards or other information regarding the Laborer's please let me

know.” This letter struck a sour note with the Respondent, and on December 1, 1998, Powell conducted another meeting with the assembled employees. During his remarks, Powell stated:

Many of you have expressed your frustration with the tactics of the union and the continual bother and safety problems associated with the handing out of union propaganda at the Alpine entrance. Our hands are tied, it is a legal activity protected by the law.

Further, Powell went on to tell the employees that the personal insults against the Respondent’s owner could not go unanswered, and proceeded to castigate union activists who are “content to wallow in envy of their co-workers and resentment towards their employers.” He likened them, generally, to “alcoholics who need to blame others for the losses they continually suffer in order to rationalize their unhealthy indulgences,” and specifically singled out Lehman’s lack of personal industry and discipline as the underlying basis of his dissatisfaction.²

On about January 24, 1999, Thompson and Lehman handed out leaflets criticizing the Respondent’s employee evaluation process as being poorly designed, biased and unfair, and went on to itemize some six fundamental defects with the process. In contrast, the leaflet extolled the merits of a union contract, which would include a constructive agreed-upon evaluation process and a grievance procedure for those who felt that they had not been fairly evaluated.

This criticism did not satisfy the Respondent’s apparent belief that union propaganda must be trustworthy and accurate, and on February 4, 1999, both Thompson and Lehman were called into the office and told by Powell that the untrue statements about the Respondent and its management and evaluation process were considered to be a personal attack and would not be tolerated. Thompson asked what falsifications Powell was referring to, and Powell replied that the flyer falsely reported that employees had been evaluated by crew leaders whom they had not worked under for as much as 2 years. Thompson explained that he had been given this very information by a crew leader, and Powell, according to Thompson, became irate and said, “Who are you going to believe? Are you going to believe a crew leader? No.”³ Then Thompson and Lehman were given Employee Correction Notices warning them that they had made “work related falsifications” and would receive time off without pay or termination if they continued this type of behavior. In an attached letter, dated February 5, 1999, they were told:

Alpine Log Homes, Inc. recognizes your right to object to it’s [sic] employment policies. You do not have the right to misrepresent the truth or distort facts. Your recent communication included outright distortions of fact and falsehoods regarding Alpine’s employment policies. Such communications serve no purpose other than to create discord and lack of harmony. Such behavior will not be tolerated.

² Powell’s remarks are not alleged as being violative of the Act.

³ It is agreed by the parties that only Burriss, the senior crew leader, is a supervisor within the meaning of the Act.

The employees working in the yard on the construction of log homes are assigned to a particular crew of approximately four or five employees. There are approximately eleven such crews during any given period of time, and the work of each crew is under the direction of a leadman or crew leader. In addition to a 30-minute lunch period when the employees apparently eat lunch in the lunchroom or in their vehicles located in the parking lot, the employees working in the yard get two 10-minute breaks during the day, one in approximately mid-morning, and one in mid-afternoon. During these breaks, the employees on each crew usually congregate together in the vicinity of the home they are building. This is particularly true in the wintertime, as a “burn barrel” is placed near each site for the purpose of providing some source of heat for the workers and also for keeping the oil used for lubricating the chain saws and machinery in a liquid state. Thus, in the wintertime, the employees will gather around the burn barrel during their breaks.

During the course of their work and during their breaks the employees customarily talk about anything that may be of interest to them—from pets to politics. There is no policy that employees are to confine their discussions and conversations to work-related matters. Thompson testified that he would sometimes talk in favor of the Union during working time, and that “more often than not” other employees would express their views against the Union.

Steven Lehman began working for the Respondent in 1995. His employment ended in March 1999. He engaged in the same organizational activities as Thompson, described above. Lehman testified that, as set forth above, on September 30, 1997, Powell held a meeting of all the production workers and announced that there would be, “No distribution of union literature . . . allowed on Alpine property at any time for any reason.”

On June 4, 1998, Lehman received the same written correction notice as Thompson, *supra*, for the same reason. He had distributed this literature at various places, including the production yard around the burn barrel during breaktimes, the parking lot after working hours, and at the gate at the entrance of the facility. According to Lehman, employees sometimes read magazines, newspapers, or books, and these materials are not prohibited.

On about November, 17, 1998, Lehman distributed literature outside the gate outlining changes in working conditions that he believed would satisfy employees’ health, safety and morale concerns, such as a medical savings plan, a place where employees could wash their hands, a telephone for employee use, and an emergency eye-wash station. He also mailed a copy of this material and, in addition, another letter to Powell, suggesting that employees be permitted to be participate in the process of employee evaluations or reviews by directly discussing such matter with their supervisors. The record shows that Lehman distributed the same or other written materials to employees in the yard during lunch.

On November 20, 1998, Lehman was called to the office and Powell told him that he accepted the letters as being from Lehman individually and not on behalf of anyone else. Lehman replied that the letters were a collective effort and did not just

come from him. Powell told Lehman not to mail him any more letters, but rather to come and speak to him personally about any problems that he might have.

Lehman distributed additional literature that month, specifically the November 21, 1998 flyer discussed above, in which he characterizes the Respondent's owner as taking advantage of the employees and "laughing all the way to the bank," and advocates the signing of authorization cards for the Union. As a result of this, on December 1, 1998 Powell called a meeting of all employees and, according to Lehman, "lambasted" him and compared him to "an alcoholic who need to have someone else to blame for his problems."

As noted above, during a meeting on February 4, 1999, Lehman and Thompson received correction notices for work-related falsifications by having distributed further literature that was critical of the employee evaluation process. According to Lehman, Powell was very upset at this meeting and said that there was no way Lehman and Thompson could even know how the evaluation process was structured. Powell, in effect, said that he didn't care what Thompson and Lehman told the employees so long as the information was factual. Lehman believed that the information was factual.

Lehman testified that he talked about the Union during "break times, lunchtimes, after work, and sometimes during work." During these times, employees would also talk against the Union. It was common for employees to discuss nonwork related matters while they worked. All sorts of subjects would be discussed, from baseball to religion to "domestic tranquility." There was no rule prohibiting the discussion of personal topics. Neither coworkers Eric Trobridge or Robert Sellers told him they did not want to hear his union talk.

On February 17, 1999, Cinfio called Lehman to the office and gave him a 5-day suspension for solicitation of employees during working hours. Powell was not present. Nothing was mentioned about Lehman having bothered employees. When Lehman asked if someone was complaining about him, Cinfio did not respond or permit further discussion, and told him not to speak to anybody on his way out of the facility.

The Employee Correction Notice, signed by Cinfio, dated February 17, 1999, states:

Solicitation of other employees during working hours
... One week off without pay starting 2-17-99 until 2-24-99 ... Steve, may return to work Thursday 2-25-99 ...
Any more solicitation of other employees during working hours will result in termination.

In response to his suspension, Lehman wrote the following letter to Powell, dated February 21, 1999:

Regarding the most recent disciplinary action that Alpine Log Homes Inc. has taken against me, I must protest that the allegations of "soliciting" are not justified.

It has been the custom during the work day to have two rest breaks of about ten minutes in length, one in the mid morning and one in the mid afternoon. During these breaks the employees have always enjoyed the right to speak about all manners of subjects ranging from baseball to religion. During one or more of these breaks I dis-

cussed some organized labor subjects in a general way, however no solicitation was made of the employees.

Therefore I recommend that I be taken off administrative leave and returned to work immediately. I also recommend that the "Employee Correction Notice" that was issued to me be expunged from my personnel file.

Lehman returned to work after his suspension, and continued talking about the Union, but attempted to limit his union conversations to break and lunchtime. Other employees also talked for and against the Union during these times. No employees told him that he was interfering with their work but, according to Lehman, some of his coworkers would say such things as, for example, "do we always have to talk about the Union," or "do we have to listen to this stuff." No one, however, ever directly told him that he was bothering or harassing them or directly requested that he no longer talk to them about the Union or discuss the Union in their presence. He did not solicit anyone to sign a card.

Several days later, In early March, 1999, during a break around the burn barrel, Lehman testified that he did state to various employees, including crew leader Toby Bedard, Doyle Bailey and two others that during his layoff he had come across an article about the Respondent's owner in a Delta Airline magazine and, interpolating from dates and information included in the article, surmised that the Respondent's owner might have been a draft dodger during the Vietnam war. Lehman testified that he may have repeated this once or twice during the course of that single breaktime conversation, and perhaps again during working time that day.

On about March 2 or 3, 1999, only about a day after the aforementioned breaktime conversation, Lehman was again called to the office, and told that he was being suspended indefinitely. On this occasion, Cinfio read the following prepared statement to Lehman:

You are being suspended indefinitely, without pay, pending a further meeting. That meeting will be one week from today.

Purpose of that meeting is for you to give us any reasons why we should continue to employ you, given:

- 1) Your continued harassment of co-workers. You've gone past mere solicitation with continued unwelcome verbal harassment.
- 2) You have made multiple comments, which disparage the personality and reputation of Alpine and its owner.

This is Alpine property, we do not have to tolerate such activities. You do not have the right to harass fellow employees or make disparaging comments about the company or its owner.

Lehman was not paid for the suspension. He understood that he was supposed to call the Respondent on March 9, 1999, to discuss the matter. Lehman testified that during his suspension he was seriously considering whether he could afford to remain employed by the Respondent if he was going to keep getting suspensions for his union activity. After thinking about this,

and "having a pretty good lead for another job,"⁴ he decided to quit. He phoned Powell on March 10, 1 day past the deadline, and said that if he still had his job he would like to turn in his 2 weeks' notice. Powell said that he would get back to him and called him back about 10 minutes later, at which time he said that as far as he was concerned, Lehman had quit when he had failed to call in on March 9, 1999, as instructed.

Operations Manager Richard Cinfio testified that the June 4, 1998 written correction notices issued to Thompson and Lehman were for distributing materials in the yard. It was the Respondent's policy that nothing could be distributed in the yard. Nor was the posting of any material permitted. There had been no deviations from these rules for some 15 years during Cinfio's tenure with the Respondent.

Cinfio testified that on February 16, 1999, Al Lambert, a crew leader, told him that Lehman had been "badgering the people about the union and about wages and stuff and they were tired of it, they didn't want to hear it." Lambert said the complaints were from Sellers and Trobridge. Then Cinfio spoke with Sellers and Trobridge. Trobridge told him that Lehman was badgering him about the Union and about wages, and that it was bothering him and interrupting his work. Sellers, according to Cinfio, said basically the same thing, namely, that employees were being harassed about the union and wages, and they didn't appreciate it.

Cinfio's notes regarding the aforementioned matter contain the following accounts: "Al Lambert came to me and said that some of his crew were upset with Steve's always talking about the Union." Cinfio asked Trowbridge if he had a complaint, and he answered, "Yes, I'm tired of Steve always talking about the Union and the remarks that he's making." Cinfio asked when Lehman did this, and Trowbridge said, "During breaks and when we're working on the building . . . Yes and I'm tired of it. I'm here to work not to listen to all this . . . He does it all the time, making remarks about wages, etc." Cinfio asked Sellers if he had any complaints about Lehman, and Sellers told him, "Yes, He talks about it all the time . . . Mainly breaks, I don't work with him much on the house."

Cinfio agreed that during his interviews with Lambert, Trowbridge and Sellers, none of the employees stated that they had been "harassed," "solicited," or "badgered" by Lehman, and admitted that the employees merely told him that they were tired of hearing about union matters from Lehman. Cinfio testified that in his opinion, solicitation and harassment were the same thing and could amount to badgering of employees if such activity was excessive. Cinfio testified that by "harassment," he was referring to the fact that employees had asked Lehman not to continue approaching them about the Union, and that Lehman's conduct was disrupting to the employees and affecting their work. Nor did it matter whether Lehman's unacceptable conduct occurred during breaktime, as the Respondent considers breaktime to be working time. Further, Cinfio agreed that the Respondent's rules prohibit employees from discussing wages among themselves, and employees were prohibited from discussing such matters. As a result of these complaints by the

employees, Lehman was given the aforementioned warning and 5-day suspension.

On about February 25, 1999, Lehman returned to work following his suspension. Cinfio testified that shortly after Lehman returned to work, employee Toby Bedard came to him and complained about Lehman's remarks regarding the Respondent's owner, Ken Theurbach. Bedard told him that some of the crew members, including Doyle Bailey, were very unhappy. Cinfio called Bailey in and spoke with him about it. Bailey told him that Lehman was making disparaging remarks about Theurbach being a draft dodger and going to Africa to evade the draft, and that, according to Cinfio, Bailey "was tired of it and it was disrupting his work." Cinfio asked if Bailey had said anything to Lehman about this, and Bailey replied that he didn't do anything about it, "he just got up and went to the bathroom, because he...didn't want to hear it anymore." Based upon his conversations with Bedard and Bailey, Cinfio notified Powell of the matter, telling him that "Lehman was making derogatory comments about the owner of the company and the company in general." Cinfio testified that after consulting with Powell, Lehman was again suspended, "with instructions that he was supposed to contact us on a certain date to give us a reason why we should return him to work."

Alan Burruss is senior crew leader, a supervisory position. The other crew leaders report to him. Burruss testified that there has always been a rule prohibiting the distribution of any materials on company property. The Respondent's rules also prohibit excessive "verbal pushing of religion on the people," or cussing too much, or being argumentative or abusive, or pushing "this union thing" too much. He recalled that a verbal warning had once been given to someone who was apparently proselytizing a religious viewpoint, and that on another occasion he had to intervene when employees were arguing. The individuals involved in these incidents were merely given a verbal warning rather than a written warning or suspension.

Burruss testified that in February 1999, crew leader Al Lambert told him that two people on the crew, Eric Trowbridge and Roger Sellers, were not happy with what was "being verbally put on them." Burruss spoke to those employees and they both said, essentially, "Look, we're tired of listening to union speeches . . . We don't want to hear it anymore." At that point, Burruss reported this to Cinfio. This resulted in Lehman's first suspension. Then, sometime after February 25, 1999 it was reported to him that other employees were complaining that they were "tired of of being harassed with [Lehman's] comments and innuendo." Cinfio spoke to these employees. Again, Burruss reported this to Cinfio, and Cinfio spoke to these employees. This investigation resulted in Lehman's final suspension.

Crew Leader Toby Bedard testified that at the end of February he became concerned about the disruption of his crew, particularly Doyle Bailey, because of remarks made by Lehman during a morning break. Bedard reported to Cinfio that "Doyle Bailey, as well as myself and others on the crew were being bothered by some of the things that were being said by Mr. Lehman," specifically, that Lehman wondered why Theurbach was vacationing in Africa during the Vietnam war, and was implying that Theurbach was a draft dodger.

⁴ Within a day or so Lehman went to work for another employer at a higher rate of pay than he had been receiving from the Respondent.

Doyle Bailey testified that in February 1999, during a break, while Lehman was talking, he got up and walked away from the group of employees to cool off as he felt his intelligence had been insulted. Crew Leader Bedard asked him what was the matter. Bailey expressed his concern about Lehman's remarks, namely Lehman's suggestion that CEO Theurbach had attempted to evade the draft. Bailey testified as follows:

My concern was attitude. Attitude, sometimes even . . . person's personal life, what that had to do with our work, I do not know. But we have new workers that come in all the time and for someone to express their opinion about someone's personal life, I feel, is uncalled for.

Bailey testified that in his opinion an employee who is dissatisfied with his wages and working conditions should merely look elsewhere for work rather than keep talking about what a union may offer the employees. However, he never told Lehman that he did not want to hear any more about the Union; rather, he just ignored what Lehman was saying.

Eric Trowbridge testified that after reporting Lehman's behavior to Crew Leader Lambert, he was called to Cinfio's office. He told Lambert and Cinfio that Lehman would make "small comments" about the Union that Trowbridge did not appreciate, such as Lehman's statements to the effect that, "Well, you know, if we had the union here, it wouldn't be a problem." These comments, according to Trowbridge, "were getting old," and he didn't want to hear them any longer and was getting annoyed. Trowbridge testified that he did in fact tell Lehman that his talk about the Union "was getting old." Trowbridge testified that it is difficult for him to simply ignore the comments of someone who is speaking, as the words are automatically processed even if the listener finds them distasteful, and therefore he could not merely ignore what Lehman was saying. Trowbridge further testified that he believed that Lehman, who had been warned by management about his union activity, did refrain from speaking about the Union "as often as usual." However, Trowbridge understood that Lehman was told by management that he could no longer talk about the Union whatsoever, and Trowbridge therefore believed that even Lehman's occasional remarks about the Union were forbidden by management.

Roger Sellers testified that he and Lehman had not gotten along from the very start for reasons apparently unrelated to Lehman's advocacy of the Union. In February, 1999, he began to be bothered by the union situation. Sellers at first believed that it would be a good idea for him to learn about the Union from Lehman, but then he began to think that Lehman "went about it the wrong way and he [Lehman] didn't heed the warnings." According to Sellers, work ceased to be fun out there because of the stress Lehman put on everybody. Sellers explained that it was not so much Lehman's talking about the Union "on breaks and stuff," rather "it was having the union representatives out there handing out paper work as we were leaving the work place . . . I thought that was wrong." Personally these things did not affect Sellers, but he became concerned about "the stress level in the yard." Sellers testified that he did not complain to his crew leader about his feelings, but was simply called into the office by Cinfio and asked to express

his concerns. Cinfio asked him what was being said by Lehman while the men were working and when they were on their breaks, and whether Lehman was "talking about the Union out there."

John Powell is president of the Respondent. Powell testified that the men on each crew work closely together as a team in order to construct each house. They utilize potentially dangerous equipment, including chainsaws, and it is important to insure that tension and personality conflicts among the among the crew be kept at a minimum. This is the reason for the Respondent's policies as set forth in its employee handbook. According to Powell, "We try to create a workplace that is devoid of controversy, because controversy causes tension . . . we provide a work place in which people can work unmolested. They're there to work, and they do not need to be bothered."

Powell testified that, generally, the crew members may discuss anything they want while working or on break, which, according to Powell, is also working time. Usually management does not know what the workers are discussing unless there are complaints. So long as employees are non-confrontational, they may talk about religion, sports, hunting, or anything else. The Respondent's no-solicitation rule is "enforced when it becomes bothersome to people." Powell testified that he considers the term "solicitation" to mean that someone is "pushing his point in a . . . strong fashion," and further, that "unwarranted, unwelcome solicitation" constitutes harassment.

Regarding Thompson's refusal to sign the receipt for the employee handbook, Powell told Thompson that if he wanted to return to work he would have to sign the receipt without modification. However, he further told Thompson that if Thompson wanted to provide him with a different document setting forth his objection to the policy, he could do so and it would be put in his file. Thompson said he would have to seek counsel, and he left the premises. The note that Powell made of the meeting with Thompson states, in part:

Also . . . told Lennie that I would not accept any exceptions or additional info. on the receipt. If he wants to express his views, put this on another document, he's certainly free to do so & it would be made a part of his file. Not saying it would be acted on, simply that we would accept the document.⁵

Regarding the alleged dissemination of false information in the handouts for which Thompson and Lehman were given written warnings, Powell testified that he found objectionable, among other things, the fact that no one other than Powell, Cinfio and Burress knew how the evaluations were weighted to arrive at an average score. Therefore, the fact that Lehman and Thompson said in the leaflet that they knew how this was done was a falsification, as each crew leader's evaluation was not given the same weight.

Regarding Lehman's March 1999 suspension, Powell testified that Lehman was instructed to call back on March 9, 1999 and make an appointment to discuss his future employment. In

⁵ Senior Crew Leader Burress also wrote an account of the meeting. The account written by Burress says nothing about Thompson being given the opportunity to include his objections in a separate document.

effect, Powell was providing a “cooling off period,” and had not decided what he was going to do when Lehman called. Powell testified that Lehman had 5 days to think about why he had been suspended and to think about reasons that would convince Powell to continue his employment. Lehman phoned him on March 10, 1999, and asked if he still had a job and, if so, stated that he was giving 2 weeks’ notice. Powell said that he would call Lehman back and did so, and told him that he considered the fact that he did not call on March 9, 1999 as a voluntary quit.

C. Analysis and Conclusions

It is well established that an employer may not prohibit employees from soliciting fellow employees to sign union cards or otherwise engage in union activity, or from distributing union-related literature during nonwork time in nonwork areas. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962); *Automotive Nashville Plastic Products*, 313 NLRB 462 (1993); *Ultrasystems Western Constructors, Inc.*, 310 NLRB 545, 552 (1993); *Waste Management of Palm Beach*, 329 NLRB 198, 200 (1999); *Ross Stores, Inc.*, 329 NLRB 573, 586 (1999). Contrary to the position of the Respondent, breaktime is nonwork time, See *Wireways, Inc.*, 309 NLRB 245 (1992); *Filene’s Basement Store*, 299 NLRB 183, 210 (1990). Clearly, the public area outside the Respondent’s gate, and the parking lot, which is almost exclusively used by employees and not by customers, are nonwork areas. Similarly, the lunchroom is a nonwork area. In addition, I find, the areas in the construction yard around the burn barrels where employees congregate during their breaks are nonwork areas during breaktime. See *United Parcel Service*, 327 NLRB 317 (1999). The Respondent has not demonstrated any sufficient safety-related or litter-related reason why the parking lot, the lunchroom, or the areas around the burn barrels during breaktime should be considered to be other than nonwork areas. See *St. Luke’s Hospital*, 300 NLRB 836 (1990).

Accordingly, I find that the June 4, 1998 Correction Notices issued to Lehman and Thompson for “Distribution of Literature on Company property” are violative of Section 8(a)(1) and (3) of the Act, as the two employees were engaged in lawful union activity by distributing union-related literature outside the Respondent’s gate, in the Respondent’s parking lot, or in other nonwork areas.

The “Solicitations and Distributions” section of the Respondent’s September 1998 handbook, *supra*, prohibits solicitation of employees and distribution of union materials “on company property.” This provision is unlawful as it precludes solicitation and distribution of union material in the parking lot, the lunchroom, and in the vicinity of the burn barrels during breaktime or other nonwork time. Accordingly, by promulgating and thereafter enforcing this provision the Respondent is violating Section 8(a)(1) of the Act.

Further, I find the Respondent’s warning notice and September 1, 1998 suspension of Thompson to be similarly unlawful. Thus, Thompson was disciplined for refusing to sign the receipt for the handbook, which receipt required him to acknowledge that he would agree to abide by an unlawful no-solicitation and distribution rule that severely inhibited his right to engage in

protected union activity. By such conduct, the Respondent has violated Section 8(a)(1) and (3) of the Act.⁶ *Horner Waldorf Corp.*, 227 NLRB 612 (1976).

Assuming *arguendo* that the January 1999 flyer distributed by Thompson and Lehman regarding the Respondent’s evaluation process contained inaccuracies, as the Respondent maintains, this is clearly no more than campaign propaganda which the Respondent may rebut if it chooses to do so, and which the employees may interpret on the basis of their own understanding of the evaluation process. Contrary to the apparent contention of the Respondent, there is no requirement that campaign propaganda materials must be truthful. Statements that are not “maliciously false” are accorded the protection of the Act. *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994); *Delta Health Center, Inc.*, 310 NLRB 26, 36 (1993); *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995). Cf. *The Hertz Corp.*, 326 NLRB 1097 (1999). There is no contention by the Respondent that anything contained in the leaflet was maliciously false. Indeed, there is no clear record evidence that any of the information contained in the leaflet was even inaccurate; nor did the Respondent attempt to point out any inaccuracies to the employees. Thus, it appears that the Respondent was more interested in attempting to inhibit the continued union activity of its employees, rather than to set the record straight regarding its evaluation process. Whatever the Respondents’ true motivation, it is clear that the February 4 and 5, 1999 warnings to Thompson and Lehman for disseminating allegedly untruthful information are violative of Section 8(a)(1) of the Act.

The Respondent, acknowledging that employees have the right to discuss whatever subjects they choose during both worktime and nonworktime, claims that this is not an unfettered right and that excessive solicitation or advocacy of a cause may be prohibited when it creates dissension or interferes with employees’ work performance. While there are certainly instances when employees may be disciplined for particularly aggressive and inappropriate union advocacy, such as, for example, uttering threats to coworkers, the evidence presented by the Respondent shows no more than that the Respondent and some employees, perhaps, may have been annoyed with Lehman, generally, for being such a staunch and persistent union advocate. This is understandable, as union matters, which may seriously impact the very livelihood of employees, frequently polarize employees and often generate strong feelings and spirited debate. After carefully considering the testimony of each of the employees who allegedly complained about Lehman, set forth above, it is clear that their testimony does not, either singly or collectively, substantiate the Respondent’s contention that they had been “harassed” or that Lehman had engaged in any conduct which would remove from him the protection of the Act. See *Postal Service*, 250 NLRB 4 fn. 1 (1980).

⁶ The Respondent’s motion that the testimony of Thompson be stricken because counsel was not furnished with a Board affidavit allegedly taken from Thompson is denied. I find that in fact, as represented by the General Counsel, no Board affidavit was taken from Thompson, and that Thompson was simply mistaken in his speculation that he may have given a statement to a Board Agent in this matter.

Nor is it clear that in the absence of the anti-union and, in particular, the anti-Lehman atmosphere created by the Respondent, Lehman's union activity would have generated any complaints whatsoever. Thus, Powell publicly denounced and berated Lehman to the employees, issued him unlawful warning notices, promulgated an unlawful no-solicitation and distribution rule in order to inhibit employees' union activity at a time when, apparently, Lehman was the leading union adherent, and even went so far, in its employee handbook, to require employees to "immediately" report to their supervisor the existence of any "harassment" on the job, "even if the employee is not sure the offending behavior is harassment . . .".⁷ Under these circumstances, it may be concluded that employees, particularly employees who were opposed to the Union, were reasonably led to believe that their reporting of Lehman's activities would be favorably received and that their complaints would be helpful in curtailing Lehman's advocacy of the Union among the employees. Therefore, the validity of their "complaints," having been either actually or impliedly solicited or invited by the Respondent, is suspect.

On the basis of the foregoing I find that the Respondent has violated Section 8(a)(1) and (3) of the Act by issuing Lehman the Correction Notice and giving him a one-week suspension beginning February 17, 1999, for "solicitation of other employees during working hours." It is clear that the "solicitation" activity for which he was warned and suspended was lawful, protected union activity and did not exceed the bounds of permissible conduct in discussing union matters with the members of his crew or other employees.

Lehman returned to work from his unlawful suspension on Thursday, February 25, 1999. He was again suspended, this time indefinitely, approximately four working days later, on March 2 or 3, 1999. On this occasion Cinfio told him that he was being suspended indefinitely, without pay, pending a further meeting. He was given the following reasons for this suspension:

1. Your continued harassment of co-workers. You've gone past mere solicitation with continued unwelcome verbal harassment.

You have made multiple comments, which disparage the personality and reputation of Alpine and its owner.

This is Alpine property, we do not have to tolerate such activities. You do not have the right to harass fellow employees or make disparaging comments about the company or its owner.

Lehman admits that during a break he speculated to employees that the Respondent's owner may have attempted to evade the draft. It appears likely that Lehman was attempting to vent his frustration over his suspension and the loss of a week's pay. Such disparagement of the Respondent's owner appears to be entirely unrelated to union activity among the employees, and is arguably unprotected conduct. However, it is clear that Lehman was suspended not only for making this remark, but, in addition, for a second reason, namely, "continued harassment of co-workers." Again, the Respondent has presented no evi-

dence showing that upon his return to work Lehman engaged in any behavior that may be characterized as harassment of co-workers sufficient to deny him the protection of the Act. Under the circumstances, particularly given the fact that Lehman had just returned to work from a prior unlawful suspension, it is clear that this second suspension, incorporating the same unlawful reason as was given for the first suspension, is similarly unlawful. The record herein demonstrates the Respondents' strong union animus in general, as shown by the promulgation and enforcement of rules prohibiting protected union activity, and its strong animus, in particular, against Lehman's union activity. I find that the Respondent has not satisfied its burden under *Wright Line*⁸ by demonstrating that Lehman would have been legitimately suspended solely for his remarks about the Respondent's owner.⁹ Accordingly, I find that the March 3, 1999 suspension of Lehman was violative of Section 8(a)(1) and (3) of the Act. I further find that the indefinite suspension was in fact a discharge, as alleged in the complaint, as the Respondent has not demonstrated that it was prepared to permit Lehman to return to work under any circumstances.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (3) of the Act as set forth herein.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer employee Steven Lehman who, it has been found, was unlawfully terminated on about March 3, 1999, immediate and full reinstatement to his former position of employment and make him whole for any loss of wages or benefits he may have suffered by reason of Respondent's discrimination against him in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In the same manner, the Respondent shall be required to make employees Lennie Thompson and Steven Lehman whole for any loss of wages or benefits they may have suffered by reason of their unlawful suspensions. In addition, the Respondent shall be required to post an appropriate notice, attached hereto as "Appendix."

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended¹⁰

⁸ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁹ See *Filene's Basement Store*, supra at 183.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

⁷ See *Automotive Plastic Technologies, Inc.*, supra.

ORDER

The Respondent, Alpine Log Homes, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Promulgating and enforcing verbal and written no-solicitation and no-distribution rules that prohibit employees from engaging in union solicitation and distribution of union-related materials on the Respondent's property during non-working time, including breaktime.
 - (b) Issuing corrective notices or other written or verbal warnings to employees for engaging in lawful protected union activities.
 - (c) Suspending employees for engaging in lawful protected union activities.
 - (d) Discharging employees for engaging in lawful protected union activities.
 - (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.
 1. Take the following affirmative action which is necessary to effectuate the purposes of the Act.
 - (a) Within 14 days from the date of this Order, expunge the current "Solicitations and Distributions" section from its Employee Handbook.
 - (b) Within 14 days after service from the Region, post at the Respondent's place of business the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
 - (c) Make whole employees Lennie Thompson and Steven Lehman in the manner set forth above in the remedy section of this decision.
 - (d) Within 14 days from the date of this Order, remove from the personnel files of Lennie Thompson and Steven Lehman any corrective notices, warning notices, letters or any other documents that relate to their suspensions or termination, and advise the said employees in writing that this has been done and that neither any documents nor their suspensions will be used against them in any way.
 - (e) Within 21 days after service by the Regional Office, file with the Regional Director for Region 19 a sworn certification

adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹¹ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: January 28, 2000

APPENDIX

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency Of The United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue or enforce written or verbal rules that prohibit employees from engaging in union solicitation or prohibit the distribution of union-related materials on company property during nonworking time, including breaktime, lunchtime or before or after work. This means that you are permitted to engage in such union activities during nonworking times in the parking lot, in the lunchroom, in the areas of the yard where the burn barrels are located, and everywhere else where employees congregate, eat their lunch, or take their breaks.

WE WILL NOT issue correction notices or other warning notices to you or suspend you for asserting your right not to sign the receipt for the Employee Handbook because it contains a provision that prohibits lawful union activities.

WE WILL delete and cease enforcing the "Solicitations and Distributions" section of our Employee Handbook, as this provision has been found to be in violation of the National Labor Relations Act.

WE WILL NOT issue correction notices or other warning notices to you or suspend you for engaging in union-related solicitation and union-related distribution of materials on company property during nonworking times.

WE WILL NOT issue correction notices or other warning notices to employees or otherwise warn, suspend or discharge them for discussing union-related matters with other employees at any time, including working time.

WE WILL NOT issue correction notices or other warning notices or otherwise warn employees to refrain from distributing leaflets, letters or other materials that criticize our employee evaluation procedure or any other procedure, rule, regulation, or policy.

WE WILL make employees Lennie Thompson and Steven Lehman whole, with interest, for any loss of wages or other benefits they may have suffered as a result of their unlawful suspensions, and we will expunge from their personnel files any corrective notices, warning notices, letters, or any other documents pertaining to their suspensions.

WE WILL offer employee Steven Lehman immediate reinstatement to his former position of employment and make him whole, with interest, for any loss of wages he may have suffered as a result of his unlawful termination, and we will expunge from his personnel file any any corrective notices, warn-

ing notices, letters, or any other documents pertaining to his termination.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

ALPINE LOG HOMES, INC.